IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.434 OF 2006
IN
NOTICE OF MOTION NO.645 OF 2005
IN
SUIT NO.550 OF 2005

1. Nensee Constructions Pvt. Ltd.)
a company duly incorporated under)
the Companies Act, 1956 having its)
office at 20A, Nagindas Master Road)
Fort, Bombay 400 023)

2. Ajay Raychand Nensee)
age and occupation: Not known)
of Bombay Indian Inhabitant having)
his place of business at Office)
No.20A, Nagindas Master Road, Fort,)
Bombay 400 023)

3. Vijay Raychand Nensee)
Age & Occupation: Not known)
of Bombay Indian Inhabitant, having)
his place of business at Office)
No.20A, Nagindas Master Road, Fort,)
Bombay 400 023) ...Appellants

versus

1. Chembur Venus Co-operative Housing)
Society Ltd., a Society duly regi-)
stered under the Maharashtra Co-)
operative Societies Act, 1960)

having its Registered Office at)
564A, Golf Links, A Soares Road,)
Chembur, Bombay 400 071)

2. Shirley Naresh Rajwani)
Age: 47 years, Occ: Business)
of Bombay, Indian Inhabitant,)
having her place of business at)
73, Jain Market, Dr.C.G. Marg,)
Chembur, Bombay 400 074)...Respondents

Mr Virag Tulzapurkar, Sr. Advocate with Mr Venkatesh Dhond and Snehal Shah and Mr N. Engineer i/by Negandhi, Shah Hidayattullah, A.P.P. for the Appellants.

Mr Rajeev Kumar with Pankaj S. Shah for the Respondent No.1.

CORAM : KSHITIJ R. VYAS, C.J. & ABHAY S. OKA, J.

DATE : JUNE 19, 2006.

P.C.:

1. By this Appeal, the Appellants - original Defendant Nos.1 to 3 have taken exception to judgment and order dated 25th April, 2006 passed by the learned single Judge of this Court in Notice of Motion taken out by the Respondent No.1 Plaintiff in a pending civil suit. By the impugned judgment and order the Notice of Motion has been made absolute granting certain interim reliefs in favour of the first Respondent.

2. With a view to appreciate the rival submissions made by the learned Counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief. It is not in dispute that the first Respondent- Society is the owner of the property in dispute and had constructed a building comprising of stilt plus six floors. By an agreement in writing dated 04th June, 2000 the first Respondent permitted the Appellants to construct two additional floors. The seventh floor was to be kept vacant as a fire refuge area and therefore, the Appellants were to construct 8th and 9th floors. The agreement provided that the Appellants will be entitled to sale or allot flats on the additional floors by entering into necessary agreements in favour of the prospective purchasers. Accordingly, a power of attorney was also executed by the first Respondent in favour of the Appellants. On 12th October, 2000, a supplementary agreement was executed by the first Respondent in favour of the first Appellant. By the said supplementary agreement, the first Respondent permitted the first Appellant to construct 10th floor which was to be identical in area to the 9th floor. Clause 4 of the said agreement, however, provided that

the Appellant shall not be entitled to dispose of or alienate the two flats, namely, 101 and 102 on the proposed 10th floor without express consent and sanction in writing of the first Respondent. The terms of the supplementary agreement were supplemented by a writing executed by the Appellants in favour of the first Respondent. In the said writing executed by the Appellants, he agreed that the minimum selling price of flat Nos.101 and 102 shall be Rs.80 lakhs each and the same shall not be sold for any lesser amount save and except with the prior approval of the first Respondent. It was stated that out of the sale proceeds of the said two flats, a sum of Rs.80 lakhs will be appropriated by the Appellants towards the cost of construction and other related expenses. The Appellants agreed that the balance amount shall be equally divided and shared between the first Respondent and the Appellants.

3. It is not disputed that flat No.102 was permitted to be sold by the Appellants by a consent in writing executed by the first Respondent. The dispute arose as the first Appellant purported to sale flat No.101 on 10th floor in favour of the second Appellant. The first Appellant purported to sale the

said flat to the second Appellant at the cost of Rs.40 lakhs. The second Appellant is the director of the first Appellant. The case of the first Respondent is that the sale of the said flat was effected without obtaining consent of the first Respondent.

4. Therefore, the first Respondent filed the suit in this court inter alia for a declaration that the agreement dated 04th June, 2000 and power of attorney of the same date executed by the first Respondent in favour of the Appellants have been validly terminated. A declaration was also prayed that agreement dated 18th August, 2004 executed by the first Appellant of sale of flat No.101 was void and illegal. Consequential prayer for possession of the said flat was incorporated in the suit. A Notice of Motion was taken out by the first Respondent which has been made absolute by the impugned order. By the impugned order, the learned single Judge directed the second Appellant to file an undertaking in this court within a period of one week undertaking therein not to transfer or alienate the flat No.101. The learned single Judge directed second Appellant to pay the outgoings and other charges to the first Respondent. The learned Judge directed the first Appellant to

deposit a sum of Rs.43 lacs within a period of eight weeks with due notice to the first Respondent. The learned single Judge directed investment of the said amount in fixed deposit. The learned Judge directed that in case first Appellant fails to deposit the amount within the time stipulated in the order, the Notice of Motion will stand granted in terms of prayer clause (b). Prayer clause (b) of the Notice of Motion is for appointment of court receiver of flat Nos.101 and two stilt parkings sold by the first Appellant to the second Appellant and for putting the first Respondent in possession of the flat and and stilt parkings as the agent of the court receiver.

5. The learned senior counsel appearing for the Appellants submitted that in the plaint there is no monitory claim made against the Appellants. He submitted that averments made in the plaint show that the first Respondent intended to file a separate suit for money claim and therefore, leave of the court was prayed for. He submitted that if there was no money claim made by the fist Respondent in the suit, the learned Single Judge has committed illegality by directing the deposit of substantial amount of Rs.43 lakhs in the court. He submitted that interim relief

sought should be in the aid of the final relief which is likely to be granted. He submitted that as the final relief was for declaration and possession, the limited relief granted by the learned single Judge of restraining the second Appellant from creating any third party interest and from parting with with possession of the flat was more than sufficient to protect the claim of the first Respondent. He submitted that the direction to deposit Rs.43 crores was uncalled for and is required to be set aside. The learned counsel appearing for the first Respondent invited our attention to the writing which incorporates additional terms in the supplementary agreement dated 12th October, 2000. He submitted that apart from the fact that flat No.101 could not have been sold without valid consent of the first Respondent, the flat could not have been sold at a price which is less than Rs.80 lakhs. He submitted that even assuming that there was consent on the part of the first Respondent to sale flat No.101, the same could not have been sold at the cost of Rs.40 lakhs without seeking prior consent of the first Respondent. He submitted that in view of these glaring circumstances, the order directing deposit of the amount is just and proper and no interference is

required.

6. We have considered the rival submissions. It is not in dispute that there is no specific consent of the first Respondent in writing to enable the first Appellant to sale the said flat to the second Appellant. By placing reliance on certain letters, the learned Counsel for the Appellants submitted that the first Respondent had consented to the first Appellant selling the flat to the second Appellant.

7. One of the letters relied upon by the learned counsel is letter dated 30th April, 2004 send by the first Respondent- Society to the first Appellant. In the said letter the first Respondent referred to request made to the first Appellant earlier for regularizing the occupation of flat No.101 on the 10th floor by executing requisite documents and by completing other compliances set out in letter dated 27th November, 2003 send by the first Respondent. It is stated in the letter that no steps have been taken by the first Appellant in that behalf. By the said letter, the first Appellant was warned that if opportunity was not availed by the first Appellant, the first Respondent will be obliged to proceed

further in the matter. Reliance was placed on letter dated 18th May, 2004 sent by the first Appellant to the Respondent enclosing therewith an agreement for sale in favour of the second Appellant. The contention of the learned counsel appearing for the Appellants was that the Respondent had infact agreed for transfer of the flat in favour of the second Appellant. To the letter dated 18th May, 2004, the first Respondent replied on 07th June, 2004 by pointing out that one Smt Sherley Rajwani has already claimed the flat No.101 on the basis of allotment letter issued by the first Respondent. Alongwith said reply the first Respondent-Society forwarded to the first Appellant a copy of the letter dated 08th May, 2004 received by the first Respondent from the said Smt. Rajwani. The first Appellant was informed that to avoid any litigation, first Appellant should clarify the position. The said letter prima facie shows that there was not at all any consent granted by the first Respondent in favour of the first Appellant for selling the flat to the second Appellant. There is one more aspect of the matter. Even according to the case of the Appellants they could not have sold flat No.101 without express consent in writing of the first Respondent. It will be, therefore, necessary to

refer to the Agreement dated 18th August, 2004 executed by the first Appellant in favour of the second Appellant. On the said agreement, a director of the first Appellant has signed as power of attorney holder of the first Respondent. It is virtually an admitted position that on the basis of power of attorney earlier granted by the first Respondent, none of the directors of first Appellant had authority to execute an agreement for sale in respect of flat No.101. There is no recital in the said agreement which indicates that consent was granted by the Respondent for sale of flat. Thus, agreement executed by the first Appellant is not on the basis of consent but on the basis of a non-existing authority. Thus, the said Agreement is not executed on the basis of express consent of the first Respondent. Being the Director of the first Appellant, the second Appellant - purchaser was fully aware about the terms of the supplementary Agreement between the first Appellant and the first Respondent.

8. The aforesaid two aspects have been considered by the learned single Judge. That is a reason why the learned single Judge has observed and in our opinion rightly that prima facie the transaction in respect of

flat No.101 appears to be illegal and unauthorized. Apart from the aforesaid finding, prima facie it appears to us that the flat could not have been sold at a price which is less than Rs.80 lakhs as agreed between the parties. It is not the case of the Appellants that the Respondent-Society had consented for the sale of flat at a price below sum of Rs.80 lakhs. On the basis of the finding that transaction made by the first Appellant was unauthorised, infact a clear case was made out for appointing a receiver. The second Appellant is not an innocent purchaser. Being a Director of the first Appellant, he was fully aware that sale transaction could not have been made without express consent in writing of the first Respondent. He has taken the risk of acquiring the flat. However, to protect the interest of second Appellant the learned Judge has directed that only in case a sum of Rs.43 lakhs is not deposited by the first Appellant within the stipulated time, the receiver will stand appointed. It must be noted here that the second Appellant is a director of the first Appellant.

9. There is no reason to interfere with a well reasoned discretionary order of interim relief passed

by the learned single Judge. Hence, the Appeal is dismissed. On the request made by the Appellants, time to deposit sum of Rs.43 lakhs fixed by the learned single Judge is extended by period of six weeks from today.

CHIEF JUSTICE

ABHAY S. OKA, J